IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 216.

COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, - - - - Petitioner,

versus

A. M. ANDERSON, RECEIVER OF NATIONAL BANK OF KENTUCKY, and
NATIONAL BANK OF KENTUCKY, - - Respondents.

PETITIONER'S REPLY BRIEF.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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PETITIONER'S REPLY BRIEF.

We have examined Brief of Respondents in Opposition to Petition for Writ of Certiorari.

We find therein assumptions, in instances not supported by the record, in other instances contrary to the record, and we call the attention of the court thereto, whether considered material or immaterial, as argument is predicated thereupon.

Respondents state several times, in effect, that at the time of the closing of the Bank, the bonds were worth in excess of their face value, then selling above par, which misconception was indulged in by the Circuit Court of Appeals. The record is to the contrary, as we have shown on page 28 of our original brief.

It is further stated that the bonds were redeemed by the payment of $58,057.71 from general assets in the pos-

session of the Receiver, which point we have presented on pages 20-23 of our original brief. All that the record shows in regard to the redemption of bonds is contained in Paragraph III of the Supplementary Stipulation of Facts, R., Vol. II, 91; the material part of which says:

> "It is further agreed that since the closing of the National Bank of Kentucky, the bonds have been redeemed by the Receiver, and are held by him, free from any pledge agreement."

Thus the facts in regard thereto are meager. It does not state definitely when the redemption was effected, nor from what funds, nor that the sum of $58,057.71 was paid. Whether the bonds were ever in the possession of the United States Government does not appear. At best the bonds were simply security and did not cover any loan made by the Federal Government to the Bank.

In this connection we note respondents' statement that after the Bank closed, a dividend of 67% was paid to creditors and further that since this case was tried in the District Court, an additional 10% dividend has been paid. From this it is clear that the United States Government, like other depositors, has received 77% of its deposits from general assets, and there is left unpaid only 23% or $13,353.27, which means that in any event general assets have not been used in excess of $13,353.27, for redemption of the bonds.

Respondents state that the case is unique, and if this is so, we think such evidences splendid grounds for allowance of writ asked for. A situation that has arisen, may arise again.

Respondents' contention that we have not in reality asserted a right to set-off, is illusory and unsound.

It is based in part upon the assumption that had we acquired the bonds they were not to be cancelled, an assumption not supported by the record, and which point we have argued on pages 28 and 29 of our original brief.

This assumption is in line with that of the Circuit Court of Appeals to the effect that:

> "Had they not been redeemed, the Commissioners would never have contended that they were entitled to them."

Wherein the Circuit Court of Appeals, as well as Respondents, has delved into the realm of metaphysics and endeavored to read the mind of a corporation.

The contention is also based under the further assumption that at the time of the closing of the Bank, the bonds were worth in excess of their face value, contrary to the record, as hereinbefore shown.

Of necessity, where one of the parties is insolvent, its obligations are not worth dollar for dollar, but to deny the right of set off for that reason, means the ignoring of the principles of equitable set off enunciated by this court. If this argument of Respondents is sound, there is no such thing as equitable set off in cases of insolvency.

Respondents' statement that, *pendente lite,* the bonds sold at a premium of $4,312.25 is not accurate, as can be seen by referring to R., Vol. I, 40, which shows that the $173,512.25, for which the bonds sold, embraced principal and accrued interest—how much of each is not shown. If, as a matter of fact, the bonds did sell at a premium, this would not affect the principle involved; and if the court should hold that for the premium of the bonds, if any, we could not recover, this would be a simple matter of adjustment.

Respondents contend that a depositor-indorser of a note may only set-off his deposit against his obligation when the maker of the note is insolvent, and two cases are relied upon, to-wit:

1. *Bank of United States* v. *Braveman,* 259 N. Y. 65, 71, 181 N. E. 50.
2. *Willing* v. *Binenstock,* 302 U. S. 272, 276.

which rule is correct.

In the New York case set-off was not allowed because the maker of the endorsed note was perfectly solvent, the court recognizing that set-off was proper if the maker of the note was insolvent.

In the *Willing* case this court quoted from the New York case establishing the same principle, but in answer to the argument of respondents that by allowing the set-off here, we would receive a preference, we note that this court says in the *Willing* case that it held in *Scott* v. *Armstrong,* 146 U. S. 499, 510:

> "That the allowance of the valid set-off cannot be considered a preference, and that only the balance, after deduction of the set-off, constitutes part of the assets of the insolvent. 'The requirement,' the court said, 'as to ratable dividends, is to make them from which belongs to the Bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the Bank.' "

This is not a contest involving an endorser-depositor, with a solvent principal behind us or with indemnity. Here the City must pay its bonds through the funds handled by the Commissioners, so the decisions cited have no applicability here.

In contending that set-off was properly denied because the bonds were pledged at the time of the closing of the Bank, respondents state that:

> "Petitioner's counsel conceded in the lower Court that there would be no right of set-off had the bonds remained pledged."

We made no such concession.

Respondents proceed:

> "He contended, however, that such right of set-off was created by virtue of the redemption of the securities by the Receiver after the Bank closed."

We did not so contend. We do not predicate our right to set-off upon the redemption. This point is argued on pages 20-23 of our Original Brief.

Respondents cite the case of *United States Fidelity & Guaranty Co.* v. *Wooldridge*, 268 U. S. 234, to which we have paid our attention, on pages 23-25 of our Original Brief. They base their argument on this point on the theory that our right of set-off was based upon redemption, which it is not; nor do we concede that had the Receiver permitted the Government to sell the bonds and applied proceeds on the Postal Savings Fund Deposit, there would be no right of set-off. It has always been our contention that our right of set-off existed upon the closing of the Bank, which respondents consistently ignore.

Respondents cite three cases holding that rights can not be gained as a result of errors of the Receiver, to wit:

United States Shipping Board, et al., v. *Rhodes*, 297 U. S. 383.
LaParr v. *City of Rockford, Illinois*, 100 F. (2d) 564.
Granzow v. *Village of Lyons, Illinois*, 39 F. (2d) 83,

which principle is correct. By the same token could our right of set-off attaching when the Bank closed have been defeated by erroneous action of the Receiver in disposing of the bonds, in the manner suggested by Respondents? The decisions in those cases do not involve a question of set-off, and have no application here, because we do not have involved any illegal pledge or anything *ultra vires* or any mistake of law or error as obtained in those cases. Must we try a moot case?

This case must be tried on the facts hereof, not on theories, suppositions or unwarranted assumptions. As we have shown, the maximum amount of pledged bonds that could have been sold is $13,353.27.

Respondents contend that under the ordinances providing for these bonds the Commissioners of the Sinking Fund cannot pay them prior to maturity, but the ordinances quoted do not support such conclusion. As shown on page 29 of our Original Brief, our right to acquire our bonds and apply the sinking fund thereon is given by Kentucky Statute 3010-9 (Appendix, p. 32).

It is contended that set-off was properly denied because the obligation of the bank on account of the deposits and the obligation of the city on account of its bonds were wholly independent transactions and in support thereof the case of *United States Fidelity & Guaranty Co.* v. *Wooldridge*, 268 U. S. 234, is relied upon, and which we have thoroughly distinguished in our Original Brief, pages 23-25.

Respondents urge that set-off was properly denied because the bonds were obligations of the City of Louisville and the funds belong to the Commissioners of the Sinking Fund of the City of Louisville, a separate corporation, which point we argued on pages 29 and 30 of our Original

Brief. Respondents contend that the City of Louisville and the Commissioners of the Sinking Fund receive their powers by separate legislation and that the statutes which create the Commissioners of the Sinking Fund do not deal with the City itself. This contention is through misapprehension and it is incorrect.

If the point is of any importance, and the Court will refer to Baldwin's 1936 Revision of Carroll's Kentucky Statutes, it will find that Chapter 89-1 thereof, beginning with Section 2742, ending 3037L-14 has to do with municipal corporations of the first class (Louisville), and that Article XXVIII thereof, beginning with Sections 3010-1, ending 3024a-10, treats with the Sinking Fund.

The sections contained in the present compilation under Chapter 89-1 are evolved from the Acts of the General Assembly of Kentucky 1891-1892-1893; Chapter 244 thereof, beginning at Page 1265, is "An Act for the Government of Cities of the First Class." The Sinking Fund provisions pertaining thereto commence with Section 224 of that Act, Page 1329 of the compilation of these Acts, and if the Court will refer to said Section 3010-1 of the present compilation above referred to, it will find a notation to that effect. The Act of 1893 relative to the Sinking Fund was amended by the Act of March 22, 1902, Chapter 83, page 191 and other Acts.

Respondents cite case of *General Discount Corporation* v. *First National Bank—Detroit*, 5 F. S. 709 (1933), wherein Respondents liken the situation to that of a parent private corporation and its subsidiaries, private corporations. There is no analogy. In the case cited, the parent private corporation and the three subsidiary private corporations were each incorporated for separate and distinct

purposes; each of the subsidiary corporations was engaged in a different line of business; each had its own stockholders and Board of Directors, although to some extent overlapping.

Respondents cite the case of *Federal Deposit Insurance Corporation* v. *Casady,* 106 F. (2d) 784 (C. C. A. 10) (1939), and reported in 24 F. S. 687. Conclusion of Respondents to the effect that the City was held not to be the owner of the accounts for the purpose of determining the extent of the FDIC guarantee, is not supported by those decisions. The District Judge recites that at the time of the failure of the Bank, the *Town of Cheyenne* had five separate deposits in the Bank, and said that the question to determine is, "whether or not the *Town of Cheyenne* had five deposits or one deposit." The *FDIC* case did not involve a question of set off, and we do not see how the decision in any way affects the case at bar. Objections to the granting of the writ, are based upon assumptions sometimes not supported by the record, at other times contrary thereto, and upon decisions that do not control the questions here involved.

The petition for review on writ of certiorari should be granted.

Respectfully submitted,

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